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September 24, 1993

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SEP 24 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Amendment of Section 73.202(b),
FM Table of Allotments
Chelan, East Wenatchee and Ephrata, Washington
(MM Docket No. 93-221, RM-8265)

Dear Mr. Caton:

Transmitted herewith on behalf of Hartline Broadcasters and TRMR, Inc. is an original and four copies of their comments in connection with the above-referenced rule making proceeding. These comments are respectfully directed to the Chief, Allocations Branch.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,


John F. Garziglia

Enclosures

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SEP 24 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Chelan, East Wenatchee)
and Ephrata, Washington))

MM Docket No. 93-221
RM-8265

To: Chief, Allocations Branch

COMMENTS

Hartline Broadcasters and TRMR, Inc. by their attorneys, pursuant to Notice of Proposed Rule Making and Order to Show Cause, DA 93-947, released August 4, 1993, hereby file their combined comments in support of the allotment of Channel 229C2 to East Wenatchee, Washington as its second local FM transmission service.^{1/} In support thereof, the following is submitted:

1. This proceeding commenced as the result of a May 27, 1993 Petition for Rule Making filed by Hartline Broadcasters proposing the allotment of Channel 229C2 to East Wenatchee, Washington. In order to accommodate the allotment, it was proposed to delete vacant Channel 230C2 at Ephrata, Washington, substitute Channel 238A for Channel 228A at Chelan, Washington, and to modify the authorization of KOZI-FM, Chelan, Washington to specify operation on Channel 238A.

2. The Petition for Rule Making originally filed by Hartline Broadcasters in this proceeding proposed the deletion of the vacant upgrade Channel 222C2 at Ephrata, Washington which had been reserved for KULE-FM, the substitution of Channel 222C2 for

^{1/} The Notice of Proposed Rule Making provided that comments were to be filed on or before September 24, 1993. Accordingly, these comments are timely filed.

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Channel 230C2 at Ephrata, Washington which was at the time the subject of a filing window, and the substitution of Channel 238A for Channel 228A at Chelan, Washington. In an apparent response to the Petition for Rule Making, KULE-FM almost immediately filed an application for its upgrade on Channel 222C2, an allotment that had lain fallow since 1989. Since KULE-FM filed a construction permit application, the Commission refused to propose any action with respect to Channel 222C2 at Ephrata, Washington.^{2/}

3. At the time the Commission ultimately considered the Petition for Rule Making, the filing window for Channel 230C2 at Ephrata, Washington had opened and closed without any applications being filed. Accordingly, the Commission proposed in the Notice of Proposed Rule Making and Order to Show Cause that, in the event no applications were filed for Channel 230C2 at Ephrata, Washington by the comment date in this proceeding, the Commission would proceed with the allotment of Channel 229C2 to East Wenatchee, Washington.

4. Hartline Broadcasters and TRMR, Inc. are composed of the same principals. Hartline Broadcasters and TRMR, Inc. are jointly filing these comments as their interests coincide in this proceeding. Since, unexpectedly, no applicants filed for Channel 230C2 during the open filing window^{3/}, TRMR, Inc. determined that it would be in its best interests to file an application for

^{2/} It is not entirely clear that this refusal of the Commission to propose action with respect to Channel 222C2 at Ephrata comports with Commission precedent.

^{3/} See FCC Public Notice, Report No. FMRM-12, Mimeo No. 32796, released April 22, 1993, establishing a filing window that closed on May 27, 1993.

Ephrata, Washington as that facility was available under the Commission's first-come first-serve rules. It appears that the application filed by TRMR, Inc. (FCC File No. BPH-930721MC) is the first and only application filed for the Ephrata, Washington facility. See Public Notice Report No. 15614, released September 2, 1993 (noting the tendering for filing of the application of TRMR, Inc. for Ephrata, Washington).

5. It is the position of Hartline Broadcasters and TRMR, Inc. that the Commission should proceed with the allotment of Channel 229C2 to East Wenatchee, Washington, as its second local FM transmission service. Clearly, the allotment of Channel 229C2 at East Wenatchee would constitute a preferential arrangement of allotments. The move of channels will be the move of a formerly vacant channel from Ephrata, a community that is already served with three operating stations [KTBI(AM), KULE(AM) and KULE-FM], to East Wenatchee, a community that is served with but one operating station [KYSN(FM)]. Ephrata has a population of 5,349 (1990 census) and East Wenatchee has a population of 2,701 (1990 census). Channel 230C2 remained vacant at Ephrata for several years. The opening of a second filing window resulted in no applications being filed during the window.

6. Even though TRMR, Inc. has filed an application for Channel 230C2 at Ephrata, the filing of the application should not forestall the proposed change in community of license. While it is well settled that applicants are not eligible to apply for

an upgrade^{4/}, no upgrade is being requested here, as the proposed change simply involves different communities of license while retaining the same classification of channel. This distinction is important as it removes this proceeding from the well settled law prohibiting applicants from seeking upgrades.

7. Since the Commission's policy was instituted prohibiting applicants from seeking upgrades, the Commission has made two fundamental changes in its rules. First, the Commission has decided that it will allow applicants to seek upgrades in channel and classification through the filing of an application in a one step procedure without instituting a rule making proceeding. See FM Channel and Class Modifications by Application, FCC 93-299, released July 13, 1993. In addition, the Commission has determined that applications, once filed, serve to cut off rule making proposals. See Conflicts Between Applications and Petitions for Rule Making, 7 FCC Rcd 4917 (1992). The interplay of these two major policy changes suggests that the Commission should continue to favorably consider this proposed change in community of license even though an application has been filed by TRMR, Inc.

8. It is uncontroverted that the Table of Allotments could be changed absent the filing of the first-come first-serve application by TRMR, Inc. It is also uncontroverted that pursuant to Section 1.420(i), once TRMR, Inc. is granted a construction permit for its first-come first-serve application,

4/ See e.g. Arlington, McKinney, Celina, Terrell, Daingerfield, College Station, Caldwell, Howe, Texas, and Durant, Oklahoma, 6 FCC Rcd 2050 (1991); Webster Springs, West Virginia, DA 93-803, released July 22, 1993.

it would be fully eligible to seek a change in its community of license under established Commission precedent. The time period sandwiched in between these two periods should not represent a time in which modifications to create a more preferential arrangement of allotments may not be made to the FM Table of Allotments.

9. The continued consideration of a change in the community of license from Ephrata to East Wenatchee makes sense from both a public policy and a public interest standpoint. This proceeding was commenced at a time in which no applications were pending for Ephrata. The first-come first-serve application of TRMR, Inc. was subsequently filed for Ephrata. TRMR, Inc. joins the original petitioner, Hartline Broadcasters, in seeking and consenting to the change in the Table of Allotments. Because of the Commission's recent decision in Conflicts Between Applications and Petitions for Rule Making, no change would be acceptable to the Channel 230C2 application of TRMR, Inc. absent consent of TRMR, Inc. That same decision should serve to give TRMR, Inc. cut-off protection in this rule making proceeding and allow the Commission to, with its consent, change the allotment city of license to East Wenatchee.

10. A first-come first-serve applicant is unique since there are no other competing applicants with an interest in a proposed community of license change. There are no competing applicants who may object to an allotment change. No disruption will occur to a comparative hearing. No claim may be made that a

higher class channel could have been applied for in the filing window.

11. The change of community for this allotment creates no further rights for other parties than would accrue once a construction permit is issued to TRMR, Inc. The Ephrata allotment community of East Wenatchee is mutually exclusive with the application of TRMR, Inc. for Ephrata. The allotment may not be changed without the consent of TRMR, Inc. as its application was cut-off vis-a-vis allocation changes as of the application filing date. See Conflicts Between Applications and Petitions for Rule Making, 7 FCC Rcd at 4919.

12. Hartline Broadcasters, when filing for this proposed allotment, made a commitment to apply for the channel when allotted, and when granted an authorization, to construct facilities promptly. TRMR, Inc., which is composed of the same principals as Hartline Broadcasters states that when the channel is allotted to East Wenatchee, it will promptly file an amendment to its application or an application for a modification to its Ephrata facility, whichever is then applicable, and when authorized, to construct the East Wenatchee facility promptly.

13. As part of the proposal, Channel 238A is being substituted for Channel 228A at Chelan, Washington, and KOZI-FM's license will be modified accordingly. TRMR, Inc. hereby states its willingness to reimburse the licensee of KOZI-FM for its reasonable costs in changing its frequency.

WHEREFORE, for the reasons above, Channel 229C2 at East Wenatchee, Washington should be substituted for Channel 230C2 at Ephrata, Washington.

Respectfully submitted,

**HARTLINE BROADCASTERS
TRMR, INC.**

By: 
John F. Garziglia
Their Attorney

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September 24, 1993

CERTIFICATE OF SERVICE

I, Tracey Westbrook, a secretary in the law firm of Pepper & Corazzini, do hereby certify that true copies of the foregoing comments were sent this 24th day of September, 1993, by first-class United States mail, postage prepaid, to the following:

Melodie A. Virtue, Esquire
Haley Bader and Potts
4350 North Fairfax Drive
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(Counsel to Basin Street Broadcasting)


Tracey Westbrook